IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001920

First-tier Tribunal No: HU/00017/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

14th September 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SUKUMAR GUNESEKARAN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bellara, Counsel, instructed by Legend Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 29 August 2023

DECISION AND REASONS

1. The Appellant is a citizen of India. His date of birth is 15 June 1979.

2. In a decision dated 8 February 2023 and promulgated on 6 March 2023 following a hearing at Field House on 17 January 2023, I set aside the decision of the First-tier Tribunal (Judge Khawar) to dismiss the Appellant's appeal. The matter was adjourned for a resumed hearing.

3. The Appellant came to the UK on 24 July 2009 having been granted entry clearance as a student. He made a successful application for LTR as a dependant under the PBS on 21 May 2011. He made successful applications on this basis on 28 October 2014, 17 January 2014, and 4 August 2014. He was granted periods of leave under the points-based system as a dependant on his wife ("the main

applicant") until 24 August 2019. The Appellant's leave was parasitic on the main applicant's leave.

4. The Appellant's application made on 22 August 2019 was for ILR on the basis of ten years' long residence under para 276B of the Immigration Rules (IR). The application was refused by the SSHD on 5 December 2019. It is against this decision that the Appellant appeals. The SSHD's case is that the Appellant had not resided lawfully in the United Kingdom by the time his leave was curtailed. His leave was curtailed on 26 September 2018, giving him leave until 27 November 2018, leaving the Appellant short of 10 years lawful residence. The SSHD's case is that the notice of curtailment of leave was sent to the main applicant's email address on 28 September 2018. The Appellant's case is that he was not aware of the notice of curtailment which was not properly served on him and therefore his leave continued. The Appellant states that the notice was not sent to him to the email address that he provided for correspondence. The significance for the Appellant is that if he is correct, he will have completed ten years lawful continuous residence (para 267B(i)(a)) in the UK and subject to the public interest considerations (para 276B(ii)) he should be granted ILR.

5. The Appellant appeal against the SSHD's decision of 5 December 2019 was dismissed by the First-tier Tribunal (Judge Bartlett). That decision was subsequently set aside by Upper Tribunal Judge Smith on 31 March 2020. The matter was remitted to the First-tier Tribunal and it came before Judge Khawar who dismissed the Appellant's appeal. Judge Khawar found that the SSHD failed to establish that the Appellant was personally served the requisite curtailment notice and therefore that "on balance the Appellant meets the criteria under paragraph 276B(i)(a)" however the judge went on to dismiss the appeal with reference to the public interest considerations (para 276B(ii)(c)).

6. The judge made the following findings:-

> '31. On the above lack of evidence/considerations, I conclude the Respondent has fail ed to establish that the Appellant was personally served the requisite curtailment notice. Therefore, on balance I conclude the Appellant meets the criteria under paragraph 276B(i)(a)'.
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> 32. The facts/evidence in this case clearly shows that it was incumbent on the Appellant to notify the Respondent in relation to material changes in his circumstances. The Appellant knew that his leave to remain was dependent upon his wife's leave to remain. Once they separated in 2016 and she went back to India (which was clearly the Appellant's case prior to this appeal hearing) he knew that he was no longer a dependant upon her. Therefore, he knew that there was no valid legal basis for him to remain in the United Kingdom. The facts establish, he not only failed to notify the Respondent in relation to the significant change in his circumstances but instead, waited three years and thereafter applied for indefinite leave to remain. In my judgment the Appellant's failure to notify the Respondent in relation to the change in circumstances clearly falls within the 'conduct' provisions in paragraph 276B(ii)(c). In my judgment it is not in the public interest to grant indefinite leave to remain in circumstances where the Appellant's conduct shows he deliberately failed to notify the Respondent in relation to a significant change in his circumstances, waited for three years and then sought to apply for ILR on the basis of having been in

> the United Kingdom lawfully for a period of ten years – when in reality he knew he was only lawfully resident until 2016 (as his wife's dependant).
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> 33. Accordingly, the Appellant cannot succeed under paragraph 276B of the Rules as he does not meet all requisite criteria thereunder'.

7. At paras 34 and 35 the judge considered the alternative, namely if the Appellant's evidence had been accepted that he separated from his wife in 2019, on this basis the Appellant would not according to the judge have satisfied the criteria of ten years' lawful residence under para 276B(i)(a) because of the finding of Judge Burnett at [29] which the judge set out:

> 'The Appellant confirmed at the hearing that he had not asked the Home Office to only serve him personally in respect of his leave. The Appellant did not dispute that the email address which the Respondent identified was his wife's email address. The Appellant did not dispute or suggest that his wife had not given the email address for the purpose of correspondence'.

8. The judge in relation to conduct also stated:-

> '36. In relation to the 'conduct' referred to in paragraph 32 (above) it is worth noting that the Respondent's Refusal Letter, in dealing with the question of the Appellant's claimed private and family life states 'You have told us that you have a family life in the UK with your partner Hemavathi Sukumar'. The Appellant has not disputed that he made this claim in his current application. Thus, it would appear that the conduct referred to herein above is somewhat aggravated by the fact that the Appellant appears to have misrepresented and used false particulars about continuing family life in the United Kingdom with his wife – when in actual fact she had left him and gone back to India in 2016.
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> 37. Accordingly, on the totality of evidence before me and the aforesaid considerations I am not satisfied that the Appellant has discharged the burden of proof to establish that he meets all relevant criteria under paragraph 276B of the Immigration Rules. The requirements of the Immigration Rules are said to be consistent with the provisions of Article 8 ECHR. There is no additional evidential material which requires to be considered under Article 8 out-with the Rules. Indeed, on the paucity of evidence before me, I conclude that there is no evidence to challenge the assertions, analysis and conclusions of the Secretary of State as specifically set out, in the part of the Reasons for Refusal Letter which deals with Article 8 private and family life. I conclude, on the evidence before me that the Respondent's decision to refuse leave to remain/removal notice, is entirely proportionate to the public aim of ensuring firm immigration control in accordance with the Rules/the law'.

9. The judge did not accept that the Appellant has established a family life in the UK and stated that no evidence had been provided of "any significant private life". Moreover, the judge at [39] said that it was "noteworthy" that the Appellant had not filed a detailed witness statement in support of his appeal. The judge noted that his witness statement of 23 April 2020 was in identical terms to the

witness statement he relied on at the error of law hearing before Judge Smith dated 19 March 2021. The judge found that it was a "patently false assertion" in that statement that the Appellant has no ties to India that could help him reintegrate because during the giving of oral evidence he stated that his wife had commenced divorce proceedings in India and that his divorce was completed in 2019 and that when he was questioned about why he had previously asserted that he had no further contact/communication from his wife since she left in 2016 he said that he had provided a Power of Attorney to his father who had dealt with the divorce proceedings on his behalf."

The error of law decision

10. I found an error of law in the decision of the First-tier Tribunal for the following reasons:

> "24. It does not appear to be challenged that the Appellant gave his personal email address to the SSHD in September 2018[1] (although his evidence to Judge Burnett was that he had not asked the Home Office to serve him personally), that he had no access to his wife's email address, he did not receive the notice of curtailment and he was not aware of it. While the judge at para 31 concluded that the 'Respondent has failed to establish that the Appellant was personally served the requisite Curtailment Notice', he did not consider whether the Appellant has rebutted the presumption that a notice to curtail was sent to electronically to an email address provided for correspondence by the Appellant (see R (Alam) v SSHD 2020 EWCA Civ 1527 and the Immigration (Leave to Enter and Remain) Order 2000 (as amended)). Therefore he made the same material error as Judge Burnett.
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> 25. Mr Bellara said that such an argument was not available to the SSHD. He relied on paragraph 10 of the decision of Judge Khawar. I find that a proper reading of paragraph 10 discloses that the SSHD was not relying on any further evidence and there had been no review of the case despite indications given by the Presenting Officer before Judge Smith. However, the SSHD's case remained that a notice of curtailment had been given to the Appellant by sending it to his wife's email address. There is nothing to support that the SSHD had moved away from this position at any time in the proceedings. Judge Khawar made the same error as Judge Burnett. There is also an issue identified in the decision of UTJ Smith (and in the Rule 24) concerning the lawfulness of the Appellant's leave in the light of his wife's circumstances.
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> 26. In respect of decision regarding para 276B (ii), I accept that the judge made findings and raised issues not relied on by the SSHD (see para 32 of Judge Khawar's decision). The SSHD'S case was that the Appellant could not satisfy para 276B(i)(a) and there was no consideration by SSHD of the matters raised in 276(B)(ii). The SSHD in the decision letter did not raise the Appellant's conduct in the context of suitability or generally when considering Article 8. While the judge was entitled to take a view concerning the Appellant's conduct, he raised issues of credibility which were not relied on by the SSHD. I find therefore the Appellant's grounds are made out.

The resumed hearing

11. I heard evidence from the Appellant and the representatives extensive submissions. The first issue for me to determine is a narrow one. Has the method of sending notice of curtailment within Article 8ZA been followed; in this case sent electronically to an email address provided for correspondence by the

[1] Both the parties agreed at the resumed hearing that this was a typographical error and 2018 should read 2011

Applicant. If so it will be deemed to have been given to the Applicant unless the contrary is proved. For the reasons I go onto explain, I find in favour of the SSHD on this issue. I have briefly considered the Appellant's grounds of appeal under Article 8. Mr Bellara was realistic about the Appellant's prospect of success should I find against him in respect of the notice of curtailment.

12. The application of the law was not in dispute between the parties who agreed that the case of R (Alam) v SSHD [2020] EWCA Civ 1527 applies. The giving of notice for the purposes of s.4 (1) of the 1971 Act and the Immigration (Leave to Enter and Remain) Order 2000 (as amended by the Immigration (Leave to Enter and Remain) (Amendment) Order 2013) ("the 2000 Order")_does not require that the recipient should have read and absorbed the contents, merely that it should be received. A recipient does not need to be aware of the notice. Receipt of an email will be effected by the arrival of the email in the inbox of the person affected. The burden of proving the negative will not be discharged by evidence, far less by mere assertion that the notice did not come to the attention of the person affected.

Articles 8ZA and 87B of the 2000 Order

13. Article 8ZA a section 4(1) notice in writing may be given to the person affected. It is headed "Grant, refusal or variation of leave by notice in writing" and provides so far as material:

> "(1) A notice in writing—
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> …
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> (d) varying a person's leave to enter or remain in the United Kingdom, may be given to the person affected as required by section 4(1) of the Act as follows.
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> (2) The notice may be—
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> (a) given by hand;
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> (b) sent by fax;
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> (c) sent by postal service to a postal address provided for correspondence by the person or the person's representative;
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> (d) sent electronically to an e-mail address provided for correspondence by the person or the person's representative;
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> (e) sent by document exchange to a document exchange number or address; or
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> (f) sent by courier.
>
> (3) Where no postal or e-mail address for correspondence has been provided, the notice may be sent—
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> (a) by postal service to—

(i) the last-known or usual place of abode, place of study or place of business of the person; or

(ii) the last-known or usual place of business of the person's representative; or

(b) electronically to—

(i) the last-known e-mail address for the person (including at the person's last-known place of study or place of business); or

(ii) the last-known e-mail address of the person's representative.

(4) Where attempts to give notice in accordance with paragraphs (2) and (3) are not possible or have failed, when the decision-maker records the reasons for this and places the notice on file the notice shall be deemed to have been given.

(5) Where a notice is deemed to have been given in accordance with paragraph (4) and then subsequently the person is located, the person shall as soon as is practicable be given a copy of the notice and details of when and how it was given.

(6) A notice given under this article may, in the case of a person who is under the age of 18 years and does not have a representative, be given to the parent, guardian or another adult who for the time being takes responsibility for the child."

14. Article 8ZB is headed "Presumptions about receipt of notice." It describes the effect of establishing that one of the methods of sending the notice in writing under Article 8ZA has been utilised:

"(1) Where a notice is sent in accordance with article 8ZA, it shall be deemed to have been given to the person affected, unless the contrary is proved—

(a) where the notice is sent by postal service—

(i) on the second day after it was sent by postal service in which delivery or receipt is recorded if sent to a place within the United Kingdom;

(ii) on the 28th day after it was posted if sent to a place outside the United Kingdom;

(b) where the notice is sent by fax, e-mail, document exchange or courier, on the day it was sent.

(2) For the purposes of paragraph (1)(a) the period is to be calculated excluding the day on which the notice is posted.

(3) For the purposes of paragraph (1)(a)(i) the period is to be calculated excluding any day which is not a business day.

(4) In paragraph (3) “business day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom to which the notice is sent.”

Findings and Reasons

15. The SSHD’s case is that the notice of curtailment of leave was sent to the main applicant’s email address on 28 September 2018, giving him leave until 27 November 2018. The Appellant in his witness statements of 19 March and 23 April 2020 and oral evidence said that he had not received the notice of curtailment. The Appellant’s case is that the notice was not sent to his personal email address which he provided to the SSHD for correspondence in 2011. He said in re-examination that he gave the SSHD his own email address in 2011 because he wanted to make sure that correspondence came to him; however, he accepted that he had not asked the SSHD to use this address. The SSHD’s position is that the curtailment notice was sent to the email provided for correspondence by the Appellant which is the main applicant’s email address.

16. I have considered the evidence in the round. I find that the SSHD served the notice of curtailment notice on the Applicant by sending it to the main applicant’s email address which I am satisfied was an email address that had been given to the SSHD for correspondence with reference to Article 8ZA (1) (d) of the Immigration (Leave to Enter and Remain) (Amendment) Order 2000. I find that the Appellant has not rebutted the presumption that notice of curtailment has been given to him. I did not find the Appellant to be a credible witness for the following reasons.

17. The Appellant has not asked the SSHD to use his personal email address in correspondence. I have considered whether the 2011 supports that the Appellant’s personal email address was provided for correspondence by him. There is an email from the Appellant to his solicitors of 1 September 2020 forwarding an email from the SSHD to the Appellant’s personal email address on 2 June 2011. The email thanks the Appellant for registering to book an appointment with UKBA. It appears to be an automatic response from UKBA to the Appellant having booked an appointment on-line using his personal email address. There is another email from UKBA to the same email address on the same day giving the Appellant unique login details. The evidence establishes that the Appellant’s personal email address is an address which has been given to the SSHD in 2011 for the of the booking of an appointment with UKBA. If it is an address that the Appellant intended to provide for correspondence, he has also given the main applicant’s email address for correspondence (this is not challenged). I find that the latter email address has been effectively used by the SSHD to communicate with the Appellant as recently as 2014.

18. I note that the Appellant came to the United Kingdom initially in 2009 as a student and was not dependant on another applicant. The first application he made as a dependant was on 21 May 2011. He made several more applications. These applications have not been produced by either party. However, the evidence supports that the main applicant’s email address has been used by the SSHD to communicate with the Appellant without issues arising. The SSHD had not been told that the marriage/relationship was at an end.

19. There are GCID records which would support that the Appellant lost his biometric card which he reported to the SSHD in December 2015. The Appellant in evidence initially stated that the records related to the loss of the main applicant's biometric card. He then changed his evidence when it was pointed out to him that there was reference to " he " having lost his card. He then said that both he and main applicant lost their biometric cards. The document created on Wednesday 31 July at 7:31, strongly supports that the Appellant lost his biometric card and not his partner or both of them. I find that the Appellant was trying to distance himself from any communication with the Respondent at this time. I did not find him credible. The significance of the evidence is that there was effective communication between the SSHD and the Appellant during this period via the lead applicant's email. There is a reference in the GCID notes created on 5 August 2014 to a letter to the Appellant sent via the main applicant's email address. There is no reference to the Appellant asking for the SSHD to use his personal email address or any reference to his personal email address at this time. There is no suggestion that the Appellant did not receive the communication in 2014. This strongly supports that the main applicant's email address was given by the Appellant for correspondence and effectively used by the SSHD to communicate with him.

20. The evidence that the Appellant gave to the First-tier Tribunal was that he had stopped working in December 2018. Mr Clarke submitted that this was because he was aware that his leave had been curtailed and his knowledge of the serious consequences if he was found to be working. He relied on the Appellant's evidence before Judge Khawar on this issue at [30] of his decision. The Appellant stated before the First-tier Tribunal that he stopped working in December 2018 because he needed a biometric card. However, it would have been an option thought to be available to him to seek an extension to the biometric card if he genuinely believed that his leave was extant until 24 August 2019. This is an point that was put to the Appellant in cross-examination and he was unable to give a cogent or credible response to this.

21. I take account that the Appellant was recorded as telling Judge Burnett that he had separated from his wife in 2016 and that he did not have access to her email account. He said to Judge Burnett that he had not spoken to his wife since they had separated. He is recorded as telling Judge Khawar that he separated from his wife in 2019, which that judge found meant that the Appellant "effectively shoots himself in the foot" because he had conceded in oral evidence that that the SSHD had emailed his wife with the curtailment notice albeit he had never seen it or received it because they were separated in 2016. The evidence before me was that the Appellant and the main applicant separated in September 2016 when she left the United Kingdom and that she had initiated divorce proceedings in 2017; however, the Appellant said that he was still married and he considered himself so until the divorce was finalised. He said that his relationship ended in August 2019. However, this does not sit well with his evidence to Judge Burnett that he had not spoken to the main applicant and did not know what she was doing since separation. He told me that she had serious mental health problems (which he suggested as a reason why she applied for a divorce) and she had returned to India for treatment. He produced evidence supporting that she had health problems. I appreciate that the Appellant has given evidence before the Tribunal on three occasions and I make an allowance for reasonable variations in

his account, however, I find that the Appellant changed his evidence throughout the hearings in order to better suit his case as it evolved.

22. Before me the Appellant sought to establish that his relationship was ongoing until 2019 despite the main applicant having left the United Kingdom and divorce proceedings having been initiated. In terms of the relevance to the issue of the notice, in oral evidence before me the Appellant stated that the notice had not been sent to the main applicant's email address and that if it had she would have forwarded it to him. This contradicts the evidence he gave to the First-tier Tribunal that he had not contact with his wife.

23. I find that when the Appellant made an application in 2019 for ILR he was not in a relationship with the main applicant, whether or not she was still in India at this time. I find that the marriage came to an end in 2016. The Applicant's evidence before me was an attempt to justify his application for ILR and not having told the SSHD that he was no longer in a relationship with the lead applicant. Moreover, the Appellant's evidence has always been that the curtailment was not sent to his personal email address and should have been. During cross-examination before me, he said that it was not sent to the main applicant's email address either, otherwise she would have forwarded it to him. The Appellant had not hitherto said this. His evidence had been that had he not received the notice as it was not sent to his personal email address and that he had no access to the main applicant's email address. While this was still his evidence, he claims in addition that had it been sent, the main applicant would have forwarded it to him. This suggests that there was still communication between the couple. There is no evidence before me from the main applicant stating that she did not receive the notice. The SSHD did not produce the curtailment decision until shortly before the hearing. This should have been produced at the start of these proceedings. However, the Appellant's case was not until the hearing before me that a curtailment decision had not been sent to the main applicant. Before then, the Appellant's case was that it had not been sent to the email address given to the SSHD for correspondence.

24. I have considered the Appellant's grounds of appeal before the First-tier Tribunal. In respect of the notice of curtailment, at [11] it is stated that during 2018 he had "family issues" with the main applicant and she wanted to return to India and therefore if she had any idea about it, she has not told him. This is at odds with the Appellant's evidence before me and before the First-tier Tribunal.

25. The Appellant has produced a statement of fitness to work for the main applicant stating that her case was assessed on 9 September 2016 and that she would be signed off work for 26 weeks from 7 September 2016. There were documents that the Appellant produced which would suggest that the she was in the United Kingdom in 2017. However, nothing turns on this.

26. I was not addressed on the 2000 Order in any detail by either representative. It was not the Appellant's case that the main applicant's email address had not been given to the SSHD at any time for correspondence. The evidence establishes that this email address has been used by the SSHD to communicate effectively with the Appellant. It may have been open to the SSHD to use the Appellant's personal email address which he used in communication with UKBA in 2011 (I accept that at one point in these protracted proceedings it was indicated by the Home Office Presenting Officer that notice was sent to the Appellant's

personal email address, but no evidence of this has been forthcoming); however, sending it to the main applicant's address complied with the law about giving notice. It was not challenged that the email address used was the main applicant's email address and that the Appellant's applications and leave were parasitic. The main applicant's address had been used by the SSHD effectively to communicate with the Appellant after 2011. It was reasonable for the SSHD to infer that the marriage was subsisting and that the address was still the address given for correspondence.

27. It is not necessary for the Appellant to be aware of the notice of curtailment for notice to have been given. However, I found the Appellant not to be a credible witness. His evidence was inconsistent and lacking in cogency. I find that his marriage had come to an end long before the 2019 application for LTR. I find that he was aware that his leave had been curtailed. However, it is not necessary for me to making findings concerning conduct for the purpose of deciding the issue of whether notice was given. Mr Clarke did not pursue an argument relating to the lawfulness of the Appellant's leave after the breakdown of his marriage.

28. The Appellant's leave was curtailed on 26 September 2018 with leave to remain being valid until 27 November 2018. Since 27 November 2018 the Appellant has not had leave. Therefore he has not completed ten years' lawful residence.

29. Mr Bellara in submissions stated that the notice should have been sent by post to the Appellant who was in the United Kingdom. This I understand is reference to Home Office Guidance. I was not given a reference to specific home office guidance; however, it is significant in this case that the main applicant had returned to India, a fact known to the SSHD. It would have been reasonably inferred by the decision maker that the Appellant had returned with her bearing in mind the parasitic nature of his leave.

30. The Appellant cannot meet the requirements of the IR. Mr Bellara was pragmatic recognising the difficulty faced by the Appellant, if he is unable to meet the Long Residence Rules. While he has been here since 2009, he does not have family in the United Kingdom. He has family in India. His leave has always been precarious and since 27 November 2018 unlawful. He cannot meet the requirements of the IR, on private or family life grounds. While he must have a private life in the United Kingdom, there is no evidence supporting that is it is significant. However, on the basis that the decision interferes with his private life, properly weighing up the factors on both sides of the argument and applying s.117B of the 2002 Act, I conclude that decision of the SSHD is proportionate.

Notice of Decision

31. The Appellant's appeal is dismissed under Article 8 ECHR.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 September 2023